

540. Participation in Criminal Street Gang

1 **The defendant is charged [in Count ____] with participating in a criminal street**
2 **gang.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant actively participated in a criminal street gang.**
8
9 **2. When the defendant participated in the gang, (he/she) knew that**
10 **members of the gang engage in or have engaged in a pattern of**
11 **criminal gang activity.**

12
13 **AND**

- 14
15 **3. The defendant willfully assisted, furthered, or promoted felonious**
16 **criminal conduct by members of the gang [or committed the**
17 **felonious gang-related conduct (himself/herself)].**

18
19 ***Active participation* means involvement with a criminal street gang in a way**
20 **that is more than passive or in name only.**

21
22 **[The People need not prove that the defendant devoted all or a substantial**
23 **part of (his/her) time or efforts to the gang, or that (he/she) was an actual**
24 **member of the gang.]**

25
26 ***A criminal street gang* is any ongoing organization, association, or group of**
27 **three or more persons:**

- 28
29 **1. That has a common name or common identifying sign or symbol.**
30
31 **2. That has, as one or more of its primary activities, the commission of**
32 **_____ <insert one or more crimes listed in Pen. Code, §**
33 **186.22(e)(1)(25)>. The activity must be a primary aim of the group**
34 **rather than an occasional act committed by one or more persons**
35 **who happen to be members of the group.**

36
37 **AND**
38

- 39 **3. Whose members, whether acting alone or together, engage in or**
40 **have engaged in a pattern of criminal gang activity.**

41
42 ***A pattern of criminal gang activity, as used here, means:***

- 43
44 **1. ([The] commission of[,] [or]/ attempted commission of[,] [or]/**
45 **conspiracy to commit[,] [or]/ solicitation to commit[,] [or]**
46 **conviction of[,] [or]/ (Having/having) a juvenile petition sustained**
47 **for commission of) [any combination of] two or more of the**
48 **following crimes:_____** *<insert one or more crimes listed in*
49 *Pen. Code, § 186.22(e)(1)–(25)>.*
50
51 **2. At least one of those crimes was committed after September 26,**
52 **1988.**
53
54 **3. The most recent crime occurred within three years of one of the**
55 **earlier crimes.**

56
57 **AND**

- 58
59 **4. The crimes were committed on separate occasions, or by two or**
60 **more persons.**

61
62 **[You cannot find that there was a pattern of criminal gang activity unless all**
63 **of you agree that two or more crimes that satisfy these requirements were**
64 **committed, but you need not all agree on which crimes were committed.]**
65

66 **As the term is used here, a *willful act* is one done willingly or on purpose.**
67

68 ***Felonious criminal conduct* means committing or attempting to commit any of**
69 **the following felonies: _____** *<insert any felonies that the defendant is*
70 *alleged to have furthered, assisted, or promoted>.*
71

72 **An active participant in gang activity committed _____** *<insert felony>*
73 **if: _____** *<insert elements of felony, substituting “active participant in gang*
74 *activity” for “defendant”>. <Repeat this paragraph as necessary for other*
75 *felonies alleged to have been committed by gang participants.>*
76

77 **To prove that the defendant willfully assisted, furthered, or promoted this**
78 **crime, the People must prove that:**
79

- 80 1. An active participant in gang activity committed _____
81 <insert offense>.
82
83 2. The defendant knew that the active participant intended to commit
84 _____ <insert offense>.
85
86 3. Before or during the crime, the defendant intended to aid and abet
87 the active participant in committing _____ <insert offense>.
88

89 **AND**
90

- 91 4. The defendant's words or conduct did in fact aid and abet the
92 commission of the crime.
93

94 Someone *aids and abets* a crime if he or she specifically intends to, and does in
95 fact, aid, facilitate, promote, encourage, or instigate the perpetrator's
96 commission of that crime.
97

98 [The fact that a person is present at the scene of a crime or fails to prevent the
99 crime does not, by itself, make him or her an aider and abettor. If you
100 conclude that defendant was present at the scene of the crime or failed to
101 prevent the crime, you may consider that fact in determining whether the
102 defendant was an aider and abettor. However, the mere presence at the scene
103 of the crime or failure to prevent the crime does not by itself constitute aiding
104 and abetting.]
105

106 [A person who aids and abets a crime is not guilty of that crime if he or she
107 withdraws before the crime is committed. To withdraw, a person must do two
108 things:
109

- 110 1. He or she must notify everyone else he or she knows is
111 involved in the commission of the crime that he or she is no
112 longer participating. The notification must be made early
113 enough to prevent the commission of the crime.
114

115 **AND**
116

- 117 2. He or she must do everything reasonably within his or her
118 power to prevent the crime from being committed. He or she
119 does not have to actually prevent the crime.
120

121 **The People have the burden of proving beyond a reasonable doubt that the**
122 **defendant did not withdraw. If the People have not met this burden, you must**
123 **find the defendant not guilty under an aiding and abetting theory.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

On request, give the first bracketed paragraph beginning, “The People need not prove that the defendant devoted all or a substantial part of . . .” if there is no evidence that the defendant was a member of the gang or devoted a substantial amount of time to the gang. (See Pen. Code, § 186.22(i).)

In element 1 of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times. (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank.

At least one of the crimes alleged to be part of a pattern of criminal gang activity must have occurred after the “effective date” of the California Street Terrorism Enforcement and Prevention Act, September 26, 1988. *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988, as the effective date].)

Related Instructions

This instruction should be used when a defendant is charged with a violation of Penal Code section 186.22(a) as a substantive offense. If the defendant is accused of an enhancement under 186.22(b), use Instruction 541, Felony Committed for Benefit of Criminal Street Gang.

For additional instructions relating to liability as an aider and abettor, see series 500, Aiding and Abetting.

AUTHORITY

Elements ▶ Pen. Code, § 186.22(a); *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468.

Active Participation Defined ▶ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747.

Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465.

Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003.

Willful Defined ▶ Pen. Code, § 7(1).

Applies to Both Perpetrator and Aider and Abettor ▶ *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750.

Felonious Criminal Conduct Defined ▶ *People v. Green* (1991) 227 Cal.App.3d 692, 704.

Separate Intent From Underlying Felony ▶ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28, pp. 526–533.

COMMENTARY

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465; *People v. Sengpadychith* (2001) 26 Cal.2d 316, 322–323, disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181, to the extent it only allowed evidence of past offenses.)

A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625), as can “another offense committed on the same occasion by a fellow gang member.” (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran, supra*, 97 Cal.App.4th 1448, 1458, fn. 4 [original italics].)

RELATED ISSUES

Conspiracy

Anyone who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by the members, is guilty of conspiracy to commit that felony. (Pen. Code, § 182.5; see Pen. Code, § 182 and instruction 550, Conspiracy.)

Labor Organizations or Mutual Aid Activities

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Related Gang Crimes

Soliciting or recruiting others to participate in a criminal street gang, or threatening someone to coerce them to join or prevent them from leaving a gang, are separate crimes. (Pen. Code, § 186.26.) It is also a crime to supply a firearm to someone who commits a specified felony while participating in a criminal street gang. (Pen. Code, § 186.28.)

Unanimity

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element of Penal Code section 186.22(a). Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528.)

STAFF NOTES

Elements

Penal Code section 186.22(a) provides:

(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

Criminal Street Gang

Penal Code section 186.22(f) provides:

(f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

“Primary activities” is discussed in *People v. Sengpadychith* (2001) 26 Cal.2d 316, 323 [original italics]:

The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group’s “chief” or “principal” occupations.” [Citation omitted.] That definition would necessarily exclude the occasional commission of those crimes by the group’s members. . . . Sufficient proof of [a] gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statutes. Also sufficient might be expert testimony . . .

Active Participation in Criminal Street Gang

Penal Code section 186.22(i) states what is *not* necessary for active participation in a criminal street gang:

(i) In order to secure a conviction, or sustain a juvenile petition, pursuant to subdivision (a), it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the

criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

Proposition 21 (approved March 7, 2000), section 35, stated:

In . . . adding subdivision (i) to Section 186.22 of the Penal Code, it is the intent of the people to reaffirm the reasoning contained in footnote 4 of *In re Lincoln J.*, 223 Cal.App.3d 322 (1990) and to disapprove of the reasoning contained in *People v. Green*, 227 Cal.App.3d [692] (1991) (holding that proof that ‘the person must devote all, or a substantial part of his or her efforts to the criminal street gang; is necessary in order to secure a conviction under subdivision (a) . . .

Footnote 4 of *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 330 states:

[I]t is clear that no evidence was introduced to show that defendant was a member of BTR at the time of the charged offense . . . Membership in a criminal street gang, however, is not an element of the offense of active participation in a criminal street gang (§ 186.22(a)); "[a]ny person who actively participates in any criminal street gang . . ." can commit that offense regardless of whether that person is a "member" of such gang.

The court in *People v. Castenada* (2000) 23 Cal.4th 743, 748, also held that *Green* erred:

In a footnote, the [*Scales*] high court mentioned this part of the trial court’s jury instruction: “ ‘In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted *all, or a substantial part, of his time and efforts* to the Party.’ ” [Citation omitted.] Relying on the italicized language, the Court of Appeal in *Green* construed section 186.22(a)’s phrase “[a]ny person who actively participates in any criminal street gang” as meaning a person who devotes “all, or a substantial part, of his time and efforts to the criminal street gang.” [Citation omitted.] *Green* erred in concluding that . . . *Scales* mandated this construction.

Castenada, supra, 23 Cal.4th at p. 747, defined active participation:

The usual and ordinary meaning of “actively” is “being in a state of action; not passive or quiescent” [citation omitted], “characterized by action rather than contemplation or speculation” [citation omitted]. The usual and

ordinary meaning of “participates” is “to take part in something (as an enterprise or activity).” [Citation omitted.] In summary, one “actively participates” in some enterprise or activity by taking part in it in a manner that is not passive. Thus, giving these words their usual and ordinary meaning, we construe the statutory language “actively participates in any criminal street gang” (§ 186.22(a)) as meaning involvement with a criminal street gang that is more than nominal or passive.

Pattern of Criminal Gang Activity

Penal Code section 186.22(e) provides:

(e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1.

(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.

(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034.

(7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(8) The intimidation of witnesses and victims, as defined in Section 136.1.

(9) Grand theft, as defined in subdivision (a) or (c) of Section 487.

(10) Grand theft of any firearm, vehicle, trailer, or vessel.

(11) Burglary, as defined in Section 459.

(12) Rape, as defined in Section 261.

(13) Looting, as defined in Section 463.

(14) Money laundering, as defined in Section 186.10.

(15) Kidnapping, as defined in Section 207.

- (16) Mayhem, as defined in Section 203.
- (17) Aggravated mayhem, as defined in Section 205.
- (18) Torture, as defined in Section 206.
- (19) Felony extortion, as defined in Sections 518 and 520.
- (20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
- (21) Carjacking, as defined in Section 215.
- (22) The sale, delivery, or transfer of a firearm, as defined in Section 12072.
- (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101.
- (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
- (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

The “effective date of this chapter” (see opening paragraph of § 186.22(e) above) is September 26, 1988. *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988 without citation of authority].)

Willfully Promote, Further, or Assist Felonious Criminal Conduct

A defendant must “willfully promote[], further[], or assist[] in any felonious criminal conduct by members of [the] gang.” (Pen. Code, § 186.22(a).)

The instruction keeps the term “promoted,” but could use “contributed to” if that term is considered to be simpler. (See *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [“ ‘promote’ means to contribute to the progress or growth of; . . . [a]n active gang member who directly perpetrates a gang-related offense ‘contributes’ to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct”].) Instruction 501, Aiding and Abetting, includes “promote.”

The court in *People v. Castenada* (2000) 23 Cal.4th 743, 748, held that someone violating section 186.22(a) has aided and abetted a felony offense by a gang member:

[S]ection 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang’s pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed

by gang members, as the Court of Appeal in *Green* . . . acknowledged. . . . The [STEP bill] sponsor's reply appears to state . . . what we have concluded here: a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members.

See also *People v. Green* (1991) 227 Cal.App.3d 692, 703–704 [person liable under § 186.22(a) is also liable as an aider and abettor; it follows that the phrase “willfully promotes, furthers, or assists” in any felonious criminal conduct by gang members is well defined by the courts].)

People v. Ngoun (2001) 88 Cal.App.4th 432, 436, 437 held that *Castenada* should not be read to strictly limit liability to aiders and abettors, but also includes direct perpetrators:

[Penal Code section 186.22(a)] applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor. . . . As we read *Castenada*, it does not stand for the proposition that only an aider and abettor is subject to liability under section 186.22, subdivision (a) and, for reasons we have expressed, it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner. We would suggest that the CALJIC committee review, with the aim of revising, this instruction.

Felonious Criminal Conduct

People v. Green (1991) 227 Cal.App.3d 692, 704 construed “felonious criminal conduct”:

We therefore construe the provision [“felonious criminal conduct”] to cover only conduct which is clearly felonious, i.e., conduct which amounts to the commission of an offense punishable by imprisonment in state prison.

Willful

This instruction uses our accepted definition of “willfully” from Penal Code section 7(a), but excludes the phrase “break the law” because the defendant must willfully promote felonious criminal conduct. (See Pen. Code, § 186.22(a).)

Registration

Any adult or juvenile convicted of participating in a criminal street gang must register with his or her local police chief or sheriff. (See Pen. Code, §§ 186.30, 186.32, 186.33; see *People v. Bailey* (2002) 101 Cal.App.4th 238, 245 [§ 186.32 not unconstitutionally vague]; *People v. Sanchez* (2002, H022692) __ Cal.App.4th __ [gang registration provisions are constitutional], **review granted and briefing**

deferred pending hearing in *In re Walter S.* (S099120) [does registration requirement constitute “punishment” for purposes of the cruel or unusual punishment provision of Cal. Const., art. I, § 7?] **and *Adrian R.* (S111812) and *Robert L. v. Superior Court* (S100359).**)

541. Felony Committed for Benefit of Criminal Street Gang

1 **If you find the defendant guilty of _____** *<insert felony or attempted*
2 *felony>* **[under Count __], you must then decide whether the People have**
3 **proved that:**

- 4
5 **1. The defendant (committed/attempted to commit) _____**
6 *<insert felony>* **(for the benefit of[,]/at the direction of[,]/ [or] in**
7 **association with] a criminal street gang.**

8
9 **AND**

- 10
11 **2. The defendant intended to (assist[,]/ further[,]/ [or] promote)**
12 **criminal conduct by gang members.**

13
14 **A *criminal street gang* is any ongoing organization, association, or group of**
15 **three or more persons:**

- 16
17 **1. That has a common name or common identifying sign or symbol.**
18
19 **2. That has, as one [or more] of its chief activities, the commission of**
20 **_____** *<insert one or more crimes listed in Pen. Code, §*
21 *186.22(e)(1)–(25)>.* **The activity must be a primary aim of the group**
22 **rather than an occasional act committed by one or more persons**
23 **who happen to be members of the group.**

24
25 **AND**

- 26
27 **3. Whose members, whether acting alone or together, engage in or**
28 **have engaged in a pattern of criminal gang activity.**

29
30 **A *pattern of criminal gang activity*, as used here, means:**

- 31
32 **1. ([The] commission of[,] [or]/ attempted commission of[,] [or]/**
33 **conspiracy to commit[,] [or]/ solicitation to commit[,] [or]/**
34 **conviction of[,] [or]/ (Having/having) a juvenile petition sustained**
35 **for commission of) [any combination of] two or more of the**
36 **following crimes:_____** *<insert one or more crimes listed in*
37 *Pen. Code, § 186.22(e)(1)–(25)>.*
38

39 **2. At least one of those crimes was committed after September 26,**
40 **1988.**

41
42 **3. The most recent crime occurred within three years of one of the**
43 **earlier crimes.**

44
45 **AND**

46
47 **4. The crimes were committed on separate occasions, or by two or**
48 **more persons.**

49
50 **[You cannot find that there was a pattern of criminal gang activity unless all**
51 **of you agree that two or more crimes that satisfy these requirements were**
52 **committed, but you need not all agree on which crimes were committed.]**

53
54 **The gang members committed _____ <insert felony> if: _____**
55 **<insert elements of felony, substituting “active participant in gang activity” for**
56 **“defendant”>. <Repeat this paragraph as necessary for other felonies alleged to**
57 **have been committed by gang members.>**

58
59 **[<Give following paragraph if the court has not instructed on the elements of the**
60 **felony the defendant is alleged to have committed.>**

61 **The defendant (committed/attempted to commit) _____ <insert felony>**
62 **if: _____ <insert elements of felony>.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (*People v. Sengpadychith* (2001) 26 Cal.2d 316, 327; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

In element 2 of the paragraph defining a “criminal street gang,” insert one or more of the crimes listed in Penal Code section 186.22(e) that are alleged to be the primary activities of the gang. (See *People v. Sengpadychith, supra*, 26 Cal.2d 316, 323–324.)

In element 1 of the paragraph defining a “pattern of criminal gang activity,” insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times. (See *In re Nathaniel C.*

(1991) 228 Cal.App.3d 990, 1002–1003 [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) Give on request the bracketed phrase “any combination of” if two or more different crimes are inserted in the blank. The prosecutor need not demonstrate that the individuals who committed the predicate offenses were gang members at the time the offenses were committed. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 366.)

Related Instructions

For an instruction regarding active participation in a criminal street gang, see Instruction 540, Participation in Criminal Street Gang.

AUTHORITY

Elements ▶ Pen. Code, § 186.22(b)(1).

Criminal Street Gang Defined ▶ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465.

Pattern of Criminal Gang Activity Defined ▶ Pen. Code, § 186.22(e); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003; see *People v. Zermeno* (1999) 21 Cal.4th 927, 931–932 [conviction of perpetrator and aider and abettor for single crime establishes only single predicate offense].

Active or Current Participation in Gang Not Required ▶ *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.

Primary Activities Defined ▶ *People v. Sengpadychith* (2001) 26 Cal.2d 316, 323–324.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 25, pp. 529–532.

RELATED ISSUES

Commission On or Near School Grounds

In imposing a sentence under Penal Code section 186.22(b)(1), it is a circumstance in aggravation if the defendant’s underlying felony was committed on or within 1,000 feet of specified schools. (Pen. Code, § 186.22(b)(2).)

Enhancements for Multiple Gang Crimes

Separate criminal street gang enhancements may be applied to gang crimes committed against separate victims at different times and places, with multiple criminal intents. (*People v. Atkins* (1997) 56 Cal.App.4th 331, 339–340.)

Labor Organizations or Mutual Aid Activities

The California Street Terrorism Enforcement and Prevention Act does not apply to labor organization activities or to employees engaged in activities for their mutual aid and protection. (Pen. Code, § 186.23.)

Unanimity

The “continuous-course-of-conduct exception” applies to the “pattern of criminal gang activity” element. Thus the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528 [in context of Pen. Code, § 186.22(a)].)

Wobblers

Specific punishments apply to any person convicted of an offense punishable as a felony or a misdemeanor that is committed for the benefit of a criminal street gang and with the intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22(d); see also *Robert L. v. Superior Court* (June 5, 2003, S100359) ___ Cal.4th ___ [finding that § 186.22(d) applies to any misdemeanor and any felony committed for benefit of criminal street gang, but published with Reporter’s Note that the opinion is subject to additional augmentation and correction].) However, the felony enhancement provided by Penal Code section 186.22(b)(1) cannot be applied to a misdemeanor offense made a felony pursuant to section 186.22(d). (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1449.)

STAFF NOTES

Elements for Criminal Street Gang Enhancement

Penal Code section 186.22(b) provides:

(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:

(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion.

(B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years.

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing.

(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraphs (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home

invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

Criminal Street Gang

Penal Code section 186.22(f) provides:

(f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

“Primary activities” is discussed in *People v. Sengpadychith* (2001) 26 Cal.2d 316, 323 [original italics]:

The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group’s “chief” or “principal” occupations.” [Citation omitted.] That definition would necessarily exclude the occasional commission of those crimes by the group’s members. . . . Sufficient proof of [a] gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statutes. Also sufficient might be expert testimony . . .

The jury may consider past offenses as well as circumstances of the charged crime. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465; *People v. Sengpadychith* (2001) 26 Cal.2d 316, 322–323, disapproving *In re Elodio O.* (1997) 56 Cal.App.4th 1175, 1181, to the extent it only allowed evidence of past offenses.) The above instruction uses “chief activities” in place of “primary activities.”

Pattern of Criminal Gang Activity

Penal Code section 186.22(e) provides:

(e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more

of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1.

(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.

(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034.

(7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(8) The intimidation of witnesses and victims, as defined in Section 136.1.

(9) Grand theft, as defined in subdivision (a) or (c) of Section 487.

(10) Grand theft of any firearm, vehicle, trailer, or vessel.

(11) Burglary, as defined in Section 459.

(12) Rape, as defined in Section 261.

(13) Looting, as defined in Section 463.

(14) Money laundering, as defined in Section 186.10.

(15) Kidnapping, as defined in Section 207.

(16) Mayhem, as defined in Section 203.

(17) Aggravated mayhem, as defined in Section 205.

(18) Torture, as defined in Section 206.

(19) Felony extortion, as defined in Sections 518 and 520.

(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.

(21) Carjacking, as defined in Section 215.

(22) The sale, delivery, or transfer of a firearm, as defined in Section 12072.

(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101.

(24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.

(25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

The “effective date of this chapter” (see opening paragraph of § 186.22(e) above) is September 23, 1988. (See Stats. 1988, chs. 1242, 1256; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 995, fn. 3; but see California Penal Code, 2002 Desktop Edition (West Group), Pen. Code, § 186.20 [editorial note stating effective date is Sept. 26, 1988]; *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988 without citation of authority].)

A “pattern of criminal gang activity” requires two or more “predicate offenses” during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625), as can “another offense committed on the same occasion by a fellow gang member.” (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10; see also *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [two incidents each with single perpetrator, or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932), and “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458, fn. 4 [original italics].)

Serious or Violent Felonies

If the defendant is convicted of a “serious felony” committed for the benefit of a criminal street gang, he or she is punished by an additional term of five years, which is in addition and consecutive to the punishment prescribed for the felony. Serious felonies are defined to be any of the felonies listed in Penal Code section 1192.7(c) [lists 41 felonies]. (Pen. Code, § 186.22(b)(1)(B).)

If the defendant is convicted of a “violent felony” committed for the benefit of a criminal street gang, he or she is punished by an additional term of 10 years, which is in addition and consecutive to the punishment prescribed for the felony. Violent felonies are defined to be any felonies listed in Penal Code section 667.5(c) [lists 22 felonies]. (Pen. Code, § 186.22(b)(1)(C).)

The instruction above includes a bracketed paragraph where the court must list the elements of the defendant’s alleged felony, if the court has not previously instructed on those elements.

Intent to Promote, Further, or Assist Criminal Conduct

A defendant must act “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Pen. Code, § 186.22(a).)

The instruction keeps the term “promoted,” but could use “contributed to” if that term is considered to be simpler. (See *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [“ ‘promote’ means to contribute to the progress or growth of; . . . [a]n active gang member who directly perpetrates a gang-related offense ‘contributes’ to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct”].)

Registration

Any adult or juvenile convicted of a crime enhanced under Penal Code section 186.22(b) must register with his or her local police chief or sheriff. (See Pen. Code, §§ 186.30, 186.32, 186.33.) **See grant of review in Walter S, Robert L, etc, in # 540.**

550. Conspiracy

1 **The defendant[s] (is/are) charged [in Count ____] with conspiracy to commit**
2 **_____ <insert alleged crime[s]>.**

3
4 **To prove that the defendant[s] (is/are) guilty of this crime, the People must**
5 **prove that:**

6
7 **1. The defendant[s] [and _____ <insert name[s] or description[s]**
8 **of coparticipant[s]>] intended to agree and did agree to commit**
9 **_____ <insert alleged crime[s]>.**

10
11 **2. At the time of the agreement, the defendant[s] [and _____**
12 **<insert name[s] or description[s] of coparticipant[s]>] intended that**
13 **one or more of the members of the conspiracy commit _____**
14 **<insert alleged crime[s]>.**

15
16 **3. The defendant[s], [or _____ <insert name[s] or description[s]**
17 **of coparticipant[s]>], [or (both/all) of them] committed [at least**
18 **one of] the overt act[s] alleged in the (information/indictment) to**
19 **accomplish _____ <insert alleged crime[s]>.**

20
21 **AND**

22
23 **4. At least one of these overt acts was committed in California.**

24
25 **A person intends to commit _____ <insert alleged crime> if he or she**
26 **intends to _____ <insert elements of intended crime; for the elements of**
27 **any intended crime, see the appropriate instruction for that crime>. <Repeat this**
28 **paragraph for any additional intended crimes.>**

29
30 **The People need not prove that any of the alleged members of the conspiracy**
31 **actually met or came to a detailed, formal agreement to commit _____**
32 **<insert alleged crime[s]>. The People must prove, however, that the alleged**
33 **members of conspiracy had a mutual understanding and intent to commit**
34 **(that/those) crime[s].**

35
36 **An overt act is an act by one or more of members of the conspiracy that is**
37 **done to help accomplish the goal of the conspiracy. The overt act must**
38 **happen after the defendant[s] (has/have) agreed to commit the crime. The**

overt act must be more than the act of agreeing or planning to commit the crime, but it need not be a criminal act itself.

[You must all agree that at least one overt act alleged in the (information/indictment) was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific act or acts were committed or who committed the act or acts.]

[You must make a separate decision about whether each defendant was a member of the alleged conspiracy.]

[You must all agree which crime or crimes the alleged members of the conspiracy intended to commit.] [You must also all agree about the degree of the crime.]

[A member of a conspiracy need not personally know the identity or roles of all the other members.]

[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit _____ <insert alleged crime[s]> is not a member of the conspiracy.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Conspiracy is an inchoate crime distinct from the underlying offense. (See *People v. Morante* (1999) 20 Cal.4th 403, 416.)

In elements 1 and 2, give either “The defendants intended . . .” or “The defendant and _____ <insert name[s]> intended . . .” If inserting names of coparticipants, insert the same names into elements 1 and 2. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131.) See also the Commentary section below.

In element 3, name either the defendant or one of the other alleged coconspirators as committing at least one overt act.

Give the first bracketed paragraph if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136.)

Give the second bracketed paragraph if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582.)

Give the third bracketed paragraph if multiple crimes are alleged as target offenses of the conspiracy. (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564.) Give the bracketed sentence regarding the degree of the crime if any target felony has different punishments for different degrees. (See Pen. Code, § 182(a).) The jury may be given a separate form of findings on which it can list the specific crimes that the jury unanimously agrees the defendant conspired to commit.

Give the fourth bracketed paragraph on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479.)

Give the final bracketed paragraph on request if the defendant argues he or she merely associated with an alleged conspirator without any criminal intent. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820.)

In the paragraph following element 4, insert the elements of any crime that is the object of the conspiracy, as shown in the example below. (See *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239.)

Sample Target Offense

A person intends to commit robbery if he or she intends to:

1. Take property that is not his or her own.
2. From another person's possession and immediate presence.
3. Against that person's will.
4. By the use of force or fear.

AND

5. With the intent (to deprive the owner of it permanently/
[or] to remove it from the owner's possession for so
extended a period of time that the owner would be
deprived of a major portion of the value or enjoyment of
the property).

Related Instructions

If substantive crimes are alleged in separate counts, also give Instruction ____, Separately Decide Each Defendant's Innocence or Guilt, as well as the appropriate instructions defining the substantive crimes. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101.)

Instruction 743, Conspiracy to Commit Murder

Instruction 735, First Degree Felony Murder: Pursuant to Conspiracy

Instruction 736, Second Degree Felony Murder: Pursuant to Conspiracy

AUTHORITY

Elements ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.

Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8; see *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10–11.

Participation in Criminal Street Gang as Conspiracy ▶ Pen. Code, § 182.5.

Association Alone Not a Conspiracy ▶ *People v. Drolet* (1973) 30 Cal.App.3d 207, 218; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820.

Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239.

Two Specific Intent ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426.

Unanimity on Specific Overt Act Not Required ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135.

Unanimity on Target Offenses of Single Conspiracy ▶ *People v. Vargas* (2001) 91 Cal.App.4th 506, 560–561, 564.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 68–97, pp. 277–314.

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as “persons unknown.” (*People v. Sacramento Butchers' Protective Association* (1910) 12 Cal.App. 471, 483; *People v. Roy* (1967) 251 Cal.App.2d 459, 463; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 82, p. 297.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

LESSER INCLUDED OFFENSES

The court has a **sua sponte** duty to instruct the jury on a lesser included target offense if there is substantial evidence from which the jury could find a conspiracy to commit that offense. (*People v. Horn* (1974) 12 Cal.3d 290, 297, disapproved on other ground in *People v. Cortez* (1998) 18 Cal.4th 1223, 1237–1238; *People v. Cook* (2001) 91 Cal.App.4th 910, 918; *People v. Kelley* (1990) 220 Cal.App.3d 1358, 1365–1366, 1369.) Alternatively, the court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy. (*People v. Cook, supra*, 91 Cal.App.4th at pp. 919–920, 922; contra, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1708–1709 [court should examine description of agreement in pleading, not description of overt acts, to decide whether lesser offense was necessarily the target of the conspiracy].)

RELATED ISSUES

Acquittal of Coconspirators

The “rule of consistency” is abandoned in conspiracy cases. The acquittal of all alleged conspirators but one does not require the acquittal of the remaining alleged conspirator. (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 864–865.)

Conspiracy to Collect Insurance Proceeds

A conspiracy to commit a particular offense does not necessarily include a conspiracy to collect insurance proceeds. (*People v. Leach* (1975) 15 Cal.3d 419, 435.)

Death of Coconspirator

A surviving conspirator is liable for proceeding with an overt act after the death of his or her coconspirator. (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1262–1262.)

Factual Impossibility

Factual impossibility of accomplishing a substantive crime is not a defense to conspiracy to commit that crime. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1130–1131; see also *United States v. Jimenez Recio* (Jan. 21, 2003, 01-1184) __ U.S. __ [rejecting the rule that a conspiracy ends when the object of the conspiracy is defeated].)

Statute of Limitations

The defendant may assert the statute of limitations defense for any felony that is the primary object of the conspiracy. The limitations period begins to run with the

last overt act committed in furtherance of the conspiracy. (*Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 410; *People v. Crosby* (1962) 58 Cal.2d 713, 728; see Pen. Code, §§ 800, 801.) If the substantive offense that is the primary object of the conspiracy is successfully attained, the statute begins to run at the same time as for the substantive offense. (*People v. Zamora* (1976) 18 Cal.3d 538, 560.) “[W]here there is a question regarding the statute of limitations, a trial court may be required to give a form of unanimity instruction obligating the jury to agree an overt act was committed within the limitations period.” (*People v. Athar* (2003) 112 Cal.App.4th 73, 81 [citing dicta in *People v. Russo* (2001) 25 Cal.4th 1124, 1136, fn. 2].) See generally Instruction 680, Statute of Limitations.

Supplier of Goods or Services

A supplier of lawful goods or services put to an unlawful use is not liable for criminal conspiracy unless he or she both knows of the illegal use of the goods or services and intends to further that use. The latter intent may be established by direct evidence of the supplier’s intent to participate, or by inference based on the supplier’s special interest in the activity or the aggravated nature of the crime itself. (*People v. Lauria* (1967) 251 Cal.App.2d 471, 476–477, 482.)

Wharton’s Rule

If the cooperation of two or more persons is necessary to commit a substantive crime, and there is no element of an alleged conspiracy that is not present in the substantive crime, then the persons involved cannot be charged with both the substantive crime and conspiracy to commit the substantive crime. (*People v. Mayers* (1980) 110 Cal.App.3d 809, 815 [known as Wharton’s Rule or “concert of action” rule].)

STAFF NOTES

Elements

Penal Code section 182(a) provides [as amended by Stats.2002, ch. 907]:

- (a) If two or more persons conspire:
 - (1) To commit any crime.
 - (2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.
 - (3) Falsely to move or maintain any suit, action, or proceeding.
 - (4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.
 - (5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.
 - (6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in paragraph (6), they are guilty of a felony and are punishable by imprisonment in the state prison for five, seven, or nine years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony the defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in paragraph (4), they shall be

punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year, or by a fine not exceeding ten thousand dollars (\$ 10,000), or by both that imprisonment and fine.

When they conspire to do any of the other acts described in this section, they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison, or by a fine not exceeding ten thousand dollars (\$ 10,000), or by both that imprisonment and fine. When they receive a felony conviction for conspiring to commit identity theft, as defined in Section 530.5, the court may impose a fine of up to twenty-five thousand dollars (\$25,000).

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done.

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

Penal Code section 184 provides:

No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement . . .

The elements of conspiracy are summarized in *People v. Morante* (1999) 20 Cal.4th 403, 416:

A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act “by one or more of the parties to such agreement” in furtherance of the conspiracy. (§ 184; *People v. Swain* (1996) 12 Cal.4th 593, 600; . . .

The elements were also summarized in *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128:

The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to

commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy.

Conspiracy does not require commission of the offense that is the object of the conspiracy, as stated in *Morante*, 20 Cal.4th at pp. 416–417:

Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy. . . . “Conspiracy is an inchoate crime. . . . It does not require the commission of the substantive offense that is the object of the conspiracy. . . . ‘As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime,’ and ‘thus reaches further back in preparatory conduct than attempt . . .’.”

A conspiracy without an overt act is not a crime, as discussed in *People v. Talbott* (1944) 65 Cal.App.2d 654, 661, 662–663:

The word conspiracy is not defined in any of the codes. Neither conspiracy, as it was known to the common law, nor as it is known today, . . . is a crime in California. Section 182 of the Penal Code provides that "if two or more persons conspire" to commit any of the acts specified in said section, they are punishable as therein provided, but only if and when "some act, beside such agreement, be done within this state to effect the object," of that which such persons conspire to do, as further provided by section 184, Penal Code. And section 183 of the Penal Code declares that "no conspiracies, other than those enumerated" in section 182, are punishable criminally. By the process of derivation, the crime created by these provisions is correctly described as criminal conspiracy, although it is not given that name by statutory enactment. Thus the criminal law recognizes conspiracy only in a limited sense.

. . . Conspiracy merely contemplates an agreement to do something evil or unlawful, whereas the crime generally referred to as criminal conspiracy consists not only of the agreement to do a specified act but, in addition thereto, requires the commission of some act to effect the object of the agreement.

Agreement

An agreement may be shown by a tacit, mutual understanding to do an unlawful act, as discussed in *People v. Calhoun* (1958) 50 Cal.2d 137, 144:

[A] conspiracy may be established by direct evidence or circumstantial evidence, or a combination of both. It need not be shown that the parties

entered into a definite agreement, but it is sufficient if they positively or tacitly come to a mutual understanding to accomplish the act and unlawful design. The evidence may cover many transactions, extend over a long period of time, and show acts which occurred some time before the alleged formation of the conspiracy, as long as the facts shown have some bearing or some tendency to prove the ultimate facts in issue.

The agreement may be inferred from circumstantial evidence (*People v. Lipinski* (1976) 65 Cal.App.3d 566, 575–576 [original italics]):

[T]he very crux of the conspiracy, the evil or corrupt agreement . . . , may be shown also by circumstantial evidence. Thus, it is not necessary to prove that the parties met and actually agreed to perform the unlawful act or that they had previously arranged a detailed plan for its execution. Rather significantly, *the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute . . .*

See also *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 57–58:

Direct proof of a formal understanding between parties to the conspiracy is not required as the basis of an indictment or information. "[It] was not necessary for the State to prove that the parties actually came together, mutually discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole. . . ."

Unlawful Act

Penal Code section 183 provides:

No conspiracies, other than those enumerated in the preceding section, are punishable criminally.

Penal Code section 182.5 provides an exception for participation in a criminal street gang:

Notwithstanding subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang, as defined in subdivision (f) of Section 186.22, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, as defined in subdivision (e)

of Section 186.22, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.

See instruction 540, Participation in Criminal Street Gang.

The object of the conspiracy must be an unlawful act. If the purpose is lawful, a charge of conspiracy does not transform it into a crime. (See *People v. Northum* (1940) 41 Cal.App.2d 284, 287–288.)

A conspiracy to commit a particular offense does not necessarily include a conspiracy to collect insurance proceeds, as held in *People v. Leach* (1975) 15 Cal.3d 419, 435:

We . . . decline to treat a conspiracy to commit a particular criminal offense as necessarily entailing a second conspiracy to collect the insurance proceeds which will be paid as a matter of course upon the successful commission of the contemplated offense. “[The] looseness and pliability of the doctrine [of conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.” (*Krulewitch v. United States*, *supra*, 336 U.S. 440, 449 . . . [concurring opn. of Jackson, J.] . . .)

Intent of at Least Two Conspirators

At least two conspirators, neither of whom are a false conspirator or government agent, must agree to commit the subject crime, as held in *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131:

We conclude that the feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other coconspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act for the purpose of accomplishing the object of the conspiracy.

Overt Act

“Overt act” is defined in *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550:

[I]t is well established that the overt act need not be a criminal act in itself. . . . It is sufficient if the overt act represents any step in furtherance of the conspiracy. It may be an otherwise lawful act and it may be merely a part of

the preliminary arrangement for the commission of the ultimate offense. . . . The purpose of the overt act is simply to show that the agreement has proceeded beyond the meeting of the minds stage to some direct or physical act, however innocent in itself, tending toward the furtherance of the objective of the conspiracy. . . . “The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work,’ . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.”

The Supreme Court defined an “overt act” in a footnote in *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8:

Courts have struggled through the years to formulate a definition for the term “overt act,” and it has been said that no single definition can be adequate for all conspiracy cases. For our purposes, it is sufficient to say that “an overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.”

It is “unnecessary that each conspirator participate in the overt acts.” (*People v. Buffum* (1953) 40 Cal.2d 409, 725, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403, 422–423.) “No more than proof of a single alleged overt act by one of the conspirators is necessary to support the verdict.” (*People v. McNamara* (1951) 103 Cal.App.2d 729, 741.)

At least one overt act must occur before commission of the crime that is the object of the conspiracy (*People v. Brown* (1991) 226 Cal.App.3d 1361, 1368):

Requiring that the overt act precede commission of the crime is consistent with the controlling statutory language. An agreement becomes punishable only upon the doing of an act “to effect” the object of the agreement. (§ 184.) The object of a punishable conspiracy is commission of a crime. (§ 182, subd. (a)(1).) The verb “to effect” means “to bring about; produce as a result; cause; accomplish.” . . . An act cannot bring about, produce, cause, or accomplish commission of a crime which has already been committed.

Courts may look to the overall objective of the conspiracy in deciding whether an overt act occurred before completion of that objective. For example, see *People v. Tatman* (1993) 20 Cal.App.4th 1, 7, 10–11:

The jury found appellant guilty of felony conspiracy to commit the crimes of (1) unlawful taking of red abalone in a prohibited area . . . , (2) unlawful possession of red abalone . . . , (3) bringing abalone ashore not attached to a

shell . . . , and (4) taking and possessing abalone where urchins are taken . . . Of the several overt acts alleged as furthering the conspiracy, the jury found true that (1) . . . appellant and [his coconspirator] were found with abalone in a hidden compartment aboard [their] fishing vessel . . . and (2) they transported [the] abalone into [the harbor]. . . .

Appellant argues that he completed all these offenses before he and [his coconspirator] were found by the officers with abalone in the boat's hidden compartment and before they transported [the] abalone into [the harbor].

We disagree. The primary objective of the conspiracy was to bring an impermissible quantity of abalone ashore for commercial profit. The objective would not be achieved until appellant and [his coconspirator] realized a profit from their illegally harvested abalone. There is substantial evidence by which the jury could find that secreting the abalone and transporting them into the harbor were done in furtherance of the agreement between appellant and [his coconspirator] to take the abalone for commercial purposes; to possess it unlawfully, i.e., to possess more than the statutorily permitted amount; and to violate the requirement that abalone be brought ashore attached to the shell.

Elements of Underlying Offense

The court must instruct on the elements of the crime that is the object of the conspiracy, as discussed in *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239:

Although the jury was properly not asked to determine the *degree* of the target murder . . . , instructions defining the essential elements of murder were required because defendant was charged with conspiring with his deceased accomplice . . . to commit the underlying criminal objective or target offense of murder . . . "[C]onspiracy is a specific intent crime requiring an intent to agree or conspire, and a further intent to commit the target crime, here murder, the object of the conspiracy." . . . Instructions on the basic elements of murder were therefore necessary to guide the jury in its determination of whether defendant harbored the requisite dual specific intent for conviction of conspiracy to commit murder.

See also *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706:

Under Penal Code section 182, the jury must determine which felony the defendants conspired to commit. The jury cannot perform that task unless it is instructed on the elements of the offense the defendants are charged with conspiring to commit and any lesser offenses which the jury could reasonably find to be the true objects of the conspiracy.

Conspiracy Formed in California to Commit Offense Out of State

California courts have jurisdiction to prosecute a defendant for in-state conspiracies to commit offenses out of state, as held in *People v. Morante* (1999) 20 Cal.4th 403, 422–424:

[W]e cannot . . . continue to maintain, as did the court’s decision in *Buffum*, that section 182 must be interpreted to encompass a conspiracy—where its object offense is committed out of state—*only* if the overt acts permitting a conspiracy to be charged amount to an attempt, within the state, to commit the underlying offense. . . . The agreement and overt act comprising the criminal offense have taken place within the state. It is that conduct (and intent), arising entirely within the state, that the statutes sanction criminally.

Unanimity on Overt Act or Actor

Except when multiple conspiracies are charged against a defendant, the jury need only unanimously agree that at least one overt act was committed for a single conspiracy, as held in *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135:

[T]he unanimity instruction is appropriate “when conviction on a single count could be based on two or more discrete criminal events,” but not “where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.” . . . In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction. . . . In this case, . . . if the jurors disagreed as to what overt act was committed, and agreed only that *an* overt act was committed, they would still have unanimously found defendant guilty of a particular conspiracy. No danger exists that some jurors would think she was guilty of one conspiracy and others would think she was guilty of a different one.

Similarly, jury unanimity is not required regarding which conspirator committed the overt act (*id.* at pp. 1135–1136):

Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy. When two or more persons combine to commit a crime, the jury need not agree on exactly who did what as long as it is convinced a particular

defendant committed the crime regardless of what that defendant's precise role may have been.

Separate Determination for Each Defendant

When multiple defendants are charged, the jury must decide the guilt or innocence of each defendant separately, as stated in *People v. Fulton* (1984) 155 Cal.App.3d 91, 101:

CALJIC No. 6.22 requires the jury to decide whether each defendant individually was a member of a charged conspiracy. . . . The jury *should* consider guilt or innocence of each defendant separately in conspiracy cases as in all others; but this does not mean, as *Fratianno* implies, it should not first determine whether a conspiracy was proved based on all the evidence.

Fulton also addressed whether to give CALJIC 17.00 [verdict as to some but not all defendants] when substantive crimes are also charged (*ibid.*):

CALJIC No. 17.00 advises the jury to separately decide each defendant's guilt or innocence. *People v. Fratianno* . . . found it *permissible* to reject the defendant's request for CALJIC No. 17.00 in a conspiracy case—even through a substantive count was also charged—on the ground it “would have been misleading in a prosecution for conspiracy where the acts of any defendant during and pursuant to the conspiracy are binding on all.” . . . In 29 years the case has yet to be cited for that proposition to our knowledge, except by CALJIC, and we believe *Fratianno*'s logic is questionable on the point. . . . California courts have become more and more sensitive to the potential for unfairness inherent in a conspiracy charge, especially “[the] psychological reality that in a trial against a number of conspirators, a weak case against one defendant will be strengthened by a mass of evidence relevant only to his codefendants.” . . . Although the instructions are cumulative to an extent, reading both might be some small help in avoiding [this] danger . . .

. . . Even if CALJIC No. 17.00 is unnecessary in a pure conspiracy case, it should still be give *sua sponte* as to additional counts joined in a conspiracy prosecution. . . . Since it would be potentially very confusing to advise the jury CALJIC No. 17.00 is inapplicable to conspiracy charges, the most practical solution is that adopted by the trial court here, give both without comment.

Unanimity on Underlying Crimes

When multiple crimes are alleged as the objects of a single conspiracy, it appears the jury must unanimously agree on which crimes the defendant or defendants

intended to commit (see, e.g., *People v. Liu* (1996) 46 Cal.App.4th 1119, 1134 [no error in instruction that required jury unanimity on which crimes were intended]), but do not need to be unanimous on the underlying facts. In *People v. Vargas* (2001) 91 Cal.App.4th 506, 561, the court concluded that it was sufficient to instruct that the jury only must be unanimous as to the target crime in deciding whether the defendants conspired to form a criminal gang:

[T]he trial court did not err when it refused to instruct the jury that it must unanimously decide whom, if anyone, defendant conspired to murder.

Vargas summarized its conclusion in dictum as follows (*id.* at p. 564):

[W]e have already determined that the jury was correctly instructed that it did not need to agree unanimously on which particular murder defendant conspired to commit so long as it unanimously agreed that defendant conspired to commit murder as the object of the conspiracy.

In summarizing the instructions given in the trial court, *Vargas* quoted the judge's explanation for refusing to give a defense instruction regarding multiple conspiracies (*id.* at p. 550):

“And it's my opinion that the jury need only be unanimous about the target crimes, that they don't have to unanimously agree as to which event, nor does that have to be reflected in the jury verdict form, whether it be which murder or which robbery or which distribution of controlled substances.”

However, in reaching its conclusion, *Vargas* used much broader language (*id.* at pp. 558, 560):

precluded a unanimity instruction. A unanimity instruction is inappropriate where multiple theories may provide the basis for a guilty verdict on one discrete criminal event.

Despite this broader language in *Vargas*, requiring jury unanimity on the underlying crime when multiple crimes are charged appears to be consistent with Penal Code section 182(a), which establishes what punishment is applied when there are multiple target felonies:

They [different forms of conspiracy] are punishable as follows:

...

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

The trial court cannot apply an appropriate punishment unless the jury first determines which felonies were committed.

Requiring such jury unanimity is also consistent with the requirement that the conspirators share the specific intent to commit target offenses. Finally, it is consistent with the general rule that “[a] unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.” (See *People v. Beardslee* (1991) 53 Cal.3d 68, 93 [no error in refusing unanimity instruction in context of single murder based on two theories].)

Unanimity That Last Overt Act Occurred Within Limitations Period

“[T]he statute [of limitations] commences from the date of the commission of the last overt act committed in furtherance of the conspiracy. (*People v. Zamora* (1976) 18 Cal.3d 538, 548–549 & fn. 7; *People v. Crosby* (1962) 58 Cal.2d 713, 728.” (*People v. Athar* (2002, D037485) __ Cal.App.4th __.) *Athar* also stated that “in dicta, the *Russo* court observed in conspiracy cases where there is a question regarding the statute of limitations, a trial court may be required to give a form of unanimity instruction obligating the jury to agree an overt act was committed within the limitations period.” (*Ibid.*)

Degree of Target Offense

Except for conspiracy to commit murder, if the target felony has different punishments for different degrees, the trier of fact must determine the degree, as established in Penal Code section 182(a):

They are punishable as follows:

. . .

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony the defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

Acquaintance with All Conspirators Not Required

The defendant need not know all the coconspirators, as held in *People v. Van Eyk* (1961) 56 Cal.2d 471, 479:

The fact that defendant may not have personally known the identity or exact functions of all the members of the conspiracy is immaterial.

See also *People v. Drake* (1957) 151 Cal.App.2d 28, 39:

Common design is the essence of conspiracy, and the crime can be committed whether the parties comprehend its entire scope, whether they act in separate groups or together, by the same or different means known or unknown to some of them, if their actions are consistently leading to the same unlawful result.

Mere Association

“Mere association alone cannot furnish the basis for a conspiracy.” (*People v. Drolet* (1973) 30 Cal.App.3d 207, 218.) See also *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820, which holds:

We recognize that conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense. . . . Associations together of persons having no criminal intent is not conspiracy.

Single or Multiple Conspiracies

As a general rule, courts look to whether there is a single objective in deciding whether there are multiple conspiracies. See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1133:

[W]hen two or more persons agree to commit a number of criminal acts, the test of whether or not they have formed a single conspiracy is whether the acts were merely steps or stages in the formation of a larger and ultimately more general, all-inclusive conspiracy directed at achieving a single unlawful result. . . . Under this rule, where the evidence shows that a group of conspirators agreed to commit a number of different crimes incidental to a single objective, there is only one conspiracy, and convictions for multiple conspiracies cannot be sustained.

Separately planned murders, however, are punishable as separate conspiracies, as discussed in *Liu, supra*:

Just as the commission of several murders of separate identifiable victims results in more harm than the commission of a single murder, a conspiracy to commit several murders is a more serious wrong than a conspiracy to commit a single murder, no matter the extent to which the several murders are planned for the accomplishment of a single criminal purpose. Each separately planned murder is the goal of a separate conspiracy.

Whether there are single or multiple conspiracies is not a question of fact and should not be submitted to the jury for determination. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133.) See also the discussion in *People v. Vargas* (2001) 91 Cal.App.4th 506, 553, 554:

Assuming that more conspiracy counts could have been charged under the facts, the decision to charge defendant with only one conspiracy count was a prosecutorial charging discretion that we do not review. The exercise of that discretion involves questions of prosecutorial policies and judgment, not questions of fact for the jury to determine. . . . Because the . . . murder did not provide evidence of a conspiracy separate from the overriding [gang] conspiracy, it did not support defendant's request for multiple conspiracies instruction. A trial court is required to instruct the jury to determine whether a single or multiple conspiracies exist only when there is evidence to support alternative findings.

Factual Impossibility

Factual impossibility is not a defense to conspiracy, as stated in *People v. Liu* (1996) 46 Cal.App.4th 1119, 1130–1131:

[P]ersons may be liable for conspiracy to commit a substantive crime even if it would be factually impossible for them to complete the crime. Completion of the crime of conspiracy does not require that the object of the conspiracy be accomplished, or even that it be possible to accomplish it.

Factual impossibility of accomplishing a substantive crime is therefore not a defense to a charge of conspiracy to commit that crime.

551. Evidence of Uncharged Conspiracy

1 **The People have introduced evidence of a conspiracy. A member of a**
2 **conspiracy is criminally liable for the acts or statements of any other member**
3 **of the conspiracy done to help accomplish the goal of the conspiracy. To**
4 **prove that the defendant[s] (was a member/were members) of this conspiracy,**
5 **the People must prove that:**

6
7 **1. The defendant[s] [and _____ <insert name[s] or description[s]**
8 **of coparticipant[s]>] intended to commit _____ <insert**
9 **crime[s]>.**

10
11 **2. The defendant[s] [and _____ <insert name[s] or description[s]**
12 **of coparticipant[s]>] intended to agree and did agree to commit**
13 **_____ <insert crime[s]>.**

14
15 **AND**

16
17 **3. The defendant[s] [or _____ <insert name[s] or description[s] of**
18 **coparticipant[s]>] committed at least one overt act in order to**
19 **accomplish _____ <insert crime[s]>.**

20
21 **A person intends to commit _____ <insert crime> if he or she intends to**
22 **_____ <insert elements of intended crime; for the elements of any intended**
23 **crime, see the appropriate instruction for that crime>. <Repeat this paragraph for**
24 **any additional intended crimes or unlawful acts.>**

25
26 **The People need not prove that any of the alleged members of the conspiracy**
27 **actually met or came to a detailed, formal agreement to commit _____**
28 **<insert crime[s]>. The People must prove, however, that the alleged members**
29 **of the conspiracy had a mutual understanding and intent to commit**
30 **(that/those) crime[s].**

31
32 **An overt act is an act by one or more of members of the conspiracy that is**
33 **done to help accomplish the agreed on crime[s]. The overt act must happen**
34 **after the defendant[s] (has/have) agreed to commit the crime. The overt act**
35 **must be more than the act of agreeing or planning to commit the crime, but it**
36 **need not be a criminal act itself.**

BENCH NOTES

Instructional Duty

Give this instruction on request when the prosecution has not charged the crime of conspiracy but has introduced evidence of a conspiracy to prove liability for other offenses or to introduce hearsay statements of coconspirators. (See, e.g., *People v. Pike* (1962) 58 Cal.2d 70, 88; *People v. Diston* (1962) 57 Cal.2d 415, 447.)

In the penultimate paragraph, insert the elements of any crime that is the object of the conspiracy. (See *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239.)

Related Instructions

For an instruction on the use of a coconspirator's incriminating statement, see Instruction 553, Coconspirator's Statements.

STAFF NOTES

Although conspiracy may not be charged, evidence of a conspiracy may still be admitted to help prove liability for other offenses, as discussed in *People v. Pike* (1962) 58 Cal.2d 70, 88:

Ceniceros complains that he was denied a fair trial in that, while no conspiracy was charged in the information, evidence was admitted against him of offenses, acts, and statements by Pike under the theory that he and Pike conspired to commit a series of robberies which culminated in the crimes of December 8, 1960. In these circumstances, however, a conspiracy need not be pleaded in the indictment or information if the evidence actually shows the existence of one.

Evidence of a conspiracy may also be introduced in order to admit hearsay declarations of coconspirators. (See *People v. Leach* (1975) 15 Cal.3d 419, 437–438 [admissions of coconspirators were not admissible when there was no independent evidence that the conspiracy was continuing].)

See also *People v. Diston* (1962) 57 Cal.2d 415, 447:

[Defendant's] final contention is that instructions on conspiracy should not have been given because the crime of conspiracy was not charged in the indictment. The point is devoid of merit. There was ample evidence from which the jury could reasonably have inferred the existence of a conspiracy among these defendants to murder [the victim], and instructions on the subject were therefore warranted as defining a factual basis upon which, if proven, the acts and declarations of the several coconspirators would be competent evidence against all.

552. Liability for Coconspirators' Acts

1 **A member of a conspiracy is criminally liable for the acts of any other**
2 **member of the conspiracy done to help accomplish the goal of the conspiracy.**

3
4 **A member of a conspiracy is also liable for any act of another member of the**
5 **conspiracy that is done to further the conspiracy and that is a natural and**
6 **probable consequence of the common plan or design of the conspiracy. This**
7 **rule applies even if the act was not intended as a part of the original plan.**
8 **[Under this rule, a defendant who is a member of the conspiracy does not**
9 **need to be present at the time of the act.]**

10
11 ***A natural and probable consequence* is one that a reasonable and prudent**
12 **person would know is likely to happen if nothing unusual intervenes. In**
13 **deciding whether a consequence is natural and probable, consider all of the**
14 **circumstances established by the evidence.**

15
16 **A member of a conspiracy is not criminally liable for the act of any member**
17 **of the conspiracy that is an independent product of that member's own mind**
18 **and that does not further the common plan or is not a natural and probable**
19 **consequence of the common plan.**

20
21 **The defendant is not liable for the acts of another member of the conspiracy**
22 **unless the People have proved that:**

23
24 **1. The defendant[s] conspired to commit _____ *<insert***
25 ***crime[s]>.***

26
27 **2. _____ *<insert nontarget offense[s]> (was/were) committed by***
28 ***[a] member[s] of the conspiracy to further the conspiracy.***

29
30 **AND**

31
32 **3. _____ *<insert nontarget offense[s]> (was/were) [a] natural and***
33 ***probable consequence[s] of the common plan or design of the***
34 ***conspiracy.***
35

BENCH NOTES

Instructional Duty

Give this instruction when there is an issue whether a conspirator is liable for the acts or statements of coconspirators. (See *People v. Flores* (1992) 7 Cal.App.4th 1350, 1363 [no sua sponte duty when no issue of independent criminal act by coconspirator].)

Give the bracketed sentence at the end of the second paragraph if there is evidence that the defendant was not present at the time of the act. (See *People v. Benenato* (1946) 77 Cal.App.2d 350, 356; *People v. King* (1938) 30 Cal.App.2d 185, 203.)

Although no published case to date gives a clear definition of the terms “natural” and “probable,” nor holds that there is a sua sponte duty to define them, a suggested definition is included. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 291 (conc. & dis. opn. of Brown, J.).)

Related Instructions

For an instruction on the use of a coconspirator’s incriminating statement, see Instruction 553, Coconspirator’s Statements.

AUTHORITY

Natural and Probable Consequences; Reasonable Person Standard ▶ *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843; see *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [in context of aiding and abetting].

Vicarious Liability of Conspirators ▶ *People v. Hardy* (1992) 2 Cal.4th 86, 188.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 93–94, pp. 310–312.

STAFF NOTES

Vicarious Liability

A conspirator is vicariously liable for the acts of his or her coconspirators in furtherance of the conspiracy, as discussed in *People v. Hardy* (1992) 2 Cal. 4th 86, 188:

The challenged instruction [CALJIC No. 6.11] correctly states the long-settled law of conspiracy. . . . As we explained regarding the analogous situation of aiding and abetting liability in *People v. Croy* (1985) 41 Cal.3d 1 . . . : "a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, *not the specific intent that is an element of the target offense*, which ... must be found by the jury."

See also *People v. Luparello* (1986) 187 Cal.App.3d 410, 437:

That a conspirator is criminally liable for acts done in furtherance and as a reasonable consequence of a conspiracy is so well settled and accepted in California jurisprudence, citation to that proposition is burdensome rather than illuminating. An early and oft-cited statement of conspiratorial liability is found in *People v. Kauffman* (1907) 152 Cal. 331[, 334] . . . : " 'The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. . . . ' "

Natural and Probable Consequences

Each conspirator is responsible for the natural and probable consequences of overt acts done to further the purpose of the conspiracy, as held in *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003:

Each member of the conspiracy is liable as such for the acts of any of the others in carrying out the common purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design. Liability extends to acts unintended or even actually forbidden by a co-conspirator.

But see discussion of *Garewal* under Forbidden Act, below.

See also *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843:

“[P]roof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy. Thus, ‘where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all.’ ” . . . Further, “a conspirator is criminally liable for the act of a coconspirator which follows as a probable and natural consequence of the common design, even though it [is] not intended as a part of the original design or common plan.”

In *People v. King* (1938) 30 Cal.App.2d 185, 203, in which the prosecution proceeded under a dual theory of aiding and abetting and conspiracy, the court stated:

In this state those persons who aid and abet in the commission of a criminal offense, though not being present, are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised.

An unconscious conspirator may still be liable for the natural and probable consequences of the illegal conspiracy, as held in *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 21:

A conspirator is criminally liable for the acts of coconspirators which follow as a probable and natural consequence of a common design, even where those acts were not intended as part of the original design or common plan. . . . Whether or not at some point during the carrying out of that design defendant was rendered unconscious does not absolve him of responsibility for a natural and probable consequence of the illegal conspiracy in which he participated.

Whether a crime is a natural and probable consequence is a jury question, as held in *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [in context of aiding and abetting]:

The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. . . . This does not mean that the issue is to be considered in the abstract as a question of law. . . . Rather, the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident.

Liability does not attach if an act was “the fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design.” (*People v. Werner* (1940) 16 Cal.2d 216, 223; *People v. Durham* (1969) 70 Cal.2d 171, 181; see *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1046.)

The definition of “natural and probable consequence” is borrowed in part from instruction 502, Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged), which relies on *Prettyman* as cited in the Bench Notes.

Commission of Intended Act

A conspiracy usually ends when the intended offense is committed, as held in *People v. Garewal* (1985) 173 Cal. App. 3d 285, 296:

[A] conspiracy to commit a particular crime concludes no earlier than the legal completion of the intended offense itself. The rule is a hoary one: "[Each] conspirator is bound by the acts of a confederate in furthering the common design of the conspiracy by escaping or resisting arrest, even though such acts may have been 'dictated by the exigencies of the moment.'"

Forbidden Act

A forbidden act cannot be anticipated as a natural and probable consequence, as held in *People v. Garewal* (1985) 173 Cal.App.3d 285, 300:

[T]he additional [instructional] language [that a conspirator is responsible for a coconspirator's act that was a natural and probable consequence of the conspiracy's object, even if it was forbidden as part of the original agreement] makes the instruction logically inconsistent, for how can one anticipate as a "probable and natural consequence[] of the object of the conspiracy" an act which was "actually forbidden as part of the agreement"? Worse, it extends a relatively mild form of vicarious liability, one which is at least limited by the reasonable contemplation of the

defendant, although perhaps not by his intent, to acts which are specifically *not* contemplated, much less intended.

553. Coconspirator's Statements

1 <Alternative A>

2 **[In deciding whether the People have proved that defendant[s] committed any**
3 **of the crimes charged, you may not consider any statements made out of**
4 **court by _____ <insert name[s] of coconspirator[s]> unless the People**
5 **have proved that it is more likely than not that:]**

6
7 <Alternative B>

8 **[In deciding whether the People have proved that defendant _____**
9 **<insert name of defendant> committed any crime charged, you may not**
10 **consider any statement made out of court by _____ <insert name of**
11 **codefendant> unless the People have proved that it is more likely than not**
12 **that:]**

13
14 **1. Some evidence other than the (statement itself/statements**
15 **themselves) establishes that a conspiracy to commit a crime existed**
16 **when the statement[s] (was/were) made.**

17
18 **2. _____ <insert name[s] of coconspirator[s]> (was/were)**
19 **participating in the conspiracy when (he/she/they) made the**
20 **statement[s].**

21
22 **3. _____ <insert name[s] of coconspirator[s]> made the**
23 **statement[s] in order to further the goal of the conspiracy.**

24
25 **AND**

26
27 **4. The statement[s] (was/were) made before or during the time that**
28 **the defendant[s] (was/were) participating in the conspiracy.**

29
30 **A statement means an oral or written expression, or nonverbal conduct**
31 **intended to be a substitute for an oral or written expression.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant if the prosecution has made a sufficient showing under Evidence Code section 1223. (See *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63.)

Give Alternative A if the People have offered statements made by an uncharged coconspirator or a conspirator not being tried as a codefendant. Give Alternative B when the People rely on statements made by one codefendant against another.

AUTHORITY

Hearsay Exception for Coconspirator's Statements ▶ Evid. Code, § 1223; *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215; *People v. Lipinski* (1976) 65 Cal.App.3d 566, 575.

Statement Defined ▶ Evid. Code, § 225.

Burden of Proof ▶ *People v. Herrera* (2000) 83 Cal.App.4th 46, 63.

Independent Evidence Conspiracy Existed at Time of Statement ▶ *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10, 436.

1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 134, p. 840.

STAFF NOTES

Evidence Code section 1223 provides:

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
- (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
- (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Evidence Code section 225 defines “statement” as follows:

“Statement” means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

The showing required for use of a coconspirator’s statements are summarized in *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215:

“Hearsay statements by coconspirators . . . may . . . be admitted against a party if, at the threshold, the offering party presents ‘independent evidence to establish prima facie the existence of . . . [a] conspiracy.’ . . . Once independent proof of a conspiracy has been shown, three preliminary facts must be established: ‘(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.’ ”

The People must prove by independent evidence that the conspiracy existed at the time of the statement, as discussed in *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10, 436:

Fn. 10. The independent evidence requirement is set forth somewhat awkwardly in subdivision (c) of Evidence Code section 1223 The court’s discretion as to the order of proof makes the putative requirement of an *advance* showing of the preliminary facts in effect

a requirement of an *independent* showing, since the change in the order of proof is more generally the rule than the exception.

. . .

The mere establishment of the existence of a[n insurance] conspiracy at some time prior to an extrajudicial declaration does not meet Evidence Code section 1223's requirement of prima facie proof by independent evidence that that conspiracy was still in existence at the time of the declaration of which evidence is proffered pursuant to the coconspirator exception.

People v. Hardy (1992) 2 Cal.4th 86, 146, discusses what statements are “in furtherance” of a conspiracy:

In many cases, a statement of a coconspirator made after apprehension “does not in any sense further the criminal enterprise, but rather frustrates it.” . . . We reemphasize, however, that no rigid rules exist in this area and that whether statements made are in furtherance of a conspiracy depends on an analysis of the totality of the facts and circumstances in the case. . . . Accordingly, “[a]lthough it has been held that statements which merely narrate past events are not to be deemed as made in furtherance of a conspiracy [citations], such a rule cannot be applied mechanically.”

The burden of proof to admit a coconspirator's declaration was discussed in *People v. Herrera* (2000) 83 Cal.App.4th 46, 63:

In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator's statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made.

The court in *Herrera* explained what evidence may be used to establish the preliminary fact of a conspiracy (*Id.* at pp. 64, 65):

The acts and declarations constituting the conspiracy agreement itself are admissible as “part of a transaction” which is in issue and are, therefore, outside the hearsay rule. . . . California courts require that the existence of the conspiracy be established by evidence independent of the proffered declaration.

People v. Brawley (1969) 1 Cal.3d 277, 289, discussed the reasoning behind the coconspirators' exception:

The coconspirator exception to the hearsay rule has been explained on the theory that the declarant conspirator is an agent of another conspirator . . . or that the declarations admitted under that exception are likely to be true . . . or that since under the criminal law a conspiracy makes each conspirator liable for the acts of another conspirator done in pursuance of the conspiracy the admissions of a coconspirator "may be used to affect the proof against the others, on the same conditions as his acts when used to create their legal liability" . . .

The trier of fact decides when a conspiracy has ended, as discussed in *People v. Hardy* (1992) 2 Cal.4th 86, 143:

The general rule is that a "conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated." . . . "It is for the trier of fact--considering the unique circumstances and the nature and purpose of the conspiracy of each case--to determine precisely when the conspiracy has ended." . . . Because the insurance companies had not yet paid out at the time of trial, the conspiracy was a continuing one, permitting the introduction of hearsay statements made during the time between the crime and the trial, pursuant to Evidence Code section 1223.

554. Acts Committed or Statements Made Before Joining Conspiracy

- 1 **(The/A) defendant is not liable for any acts that were done before (he/she)**
2 **joined the conspiracy.**
3
4 **You may consider evidence of acts or statements made before the defendant**
5 **joined the conspiracy only to show the nature and goals of the conspiracy, but**
6 **not to prove that the defendant is guilty of any crimes committed before**
7 **(he/she) joined the conspiracy.**
-

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is evidence suggesting that the defendant joined an alleged conspiracy after the crime was committed or after an act or statement was made to further the object of the conspiracy.

AUTHORITY

Joining Conspiracy After Commission of Crime ▶ *People v. Marks* (1988) 45 Cal.3d 1335, 1345; *People v. Feldman* (1959) 171 Cal.App.2d 15, 21–22.
Use of Prior Acts or Statements ▶ *People v. Weiss* (1958) 50 Cal.2d 535, 564–566.
1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 95–96, pp. 312–313.

STAFF NOTES

A conspirator is not liable for acts committed by coconspirators before he or she joined the conspiracy, as held in *People v. Marks* (1988) 45 Cal.3d 1335, 1345:

A conspirator cannot be held liable for a substantive offense committed pursuant to the conspiracy if the offense was committed *before* he joined the conspiracy. . . . The trial court, however, did not instruct the jury that it must find defendant joined the conspiracy before the murder. A trial court has a sua sponte duty to instruct on the general principles of law relevant to the issues raised by the evidence. . . . There was evidence suggesting that defendant did not join the alleged conspiracy until after the murder.

See also *People v. Weiss* (1958) 50 Cal.2d 535, 564–566 [disapproving cases that imply that a defendant can be held retroactively liable for substantive offense committed by conspirators], which discussed when such evidence may be admitted:

[The People] urged only the rule that where a person joins a conspiracy after its formation and actively participates in it, he adopts the prior acts and declarations of his fellow conspirators pursuant to the conspiracy *to the extent that evidence of those acts and declarations is admissible against him*. . . . [I]t is admissible against him only to show such matters as the nature and objectives of the conspiracy in which he joins, and the incidents thereof, but not to prove his guilt of substantive crimes theretofore committed.

Although not required sua sponte, the absence of an instruction may prevent an appellate court from determining the basis for a verdict, as discussed in *People v. Brown* (1991) 226 Cal.App.3d 1361, 1368:

The difficulty in ascertaining the basis upon which the jury reached its verdict on the robbery count is exacerbated by the court's failure to instruct the jury that it had to find [that the defendant] joined the conspiracy *before* the crime was committed (CALJIC No. 6.19). We do not decide, as appellant requests, that failure to give CALJIC No. 6.19 sua sponte was reversible error. We merely conclude that the absence of that instruction precludes us from finding that the jury did not rest its verdict on a conspiracy theory based on acts occurring before [the defendant] joined the conspiracy.

555. Withdrawal From Conspiracy

1 **The defendant is not guilty of conspiracy to commit _____ <insert target**
2 **offense> if (he/she) withdrew from the alleged conspiracy before any overt act**
3 **was committed. To withdraw from a conspiracy, a person must clearly and**
4 **voluntarily communicate to the other known members of the conspiracy that**
5 **he or she rejects the goal of the conspiracy. The communication may be made**
6 **orally or by other conduct.**

7
8 **[A failure to act is not sufficient alone to withdraw from a conspiracy.]**
9

10 **[If you decide that the defendant withdrew from a conspiracy after an overt**
11 **act was committed, the defendant is not guilty of any acts committed by**
12 **remaining members of the conspiracy after (he/she) withdrew.]**
13

14 **The People have the burden of proving beyond a reasonable doubt that the**
15 **defendant did not withdraw from the conspiracy [before an overt act was**
16 **committed]. If the People have not met this burden, you must find the**
17 **defendant not guilty of conspiracy. [If the People have not met this burden,**
18 **you must find the defendant not guilty of the additional acts committed after**
19 **(he/she) withdrew.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is evidence that the defendant attempted to withdraw from the conspiracy.

The court has a **sua sponte** duty to instruct on the burden of proof when the defense of withdrawal is raised. (*People v. Nguyen* (Aug. 13, 2003, Court of Appeal) 2003 DJDAR 9096, 9102.)

AUTHORITY

Withdrawal From Conspiracy as Defense ► *People v. Crosby* (1962) 58 Cal.2d 713, 731.

Ineffective Withdrawal ► *People v. Sconce* (1991) 228 Cal.App.3d 693, 701;
People v. Beaumaster (1971) 17 Cal.App.3d 996, 1003.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 92, pp. 309–310.

STAFF NOTES

An affirmative withdrawal from the conspiracy may constitute a defense, as discussed in *People v. Crosby* (1962) 58 Cal.2d 713, 731:

A defendant's mere failure to continue previously active participation in a conspiracy, however, is not enough to constitute withdrawal; there must be an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the coconspirators. . . . It is not part of the People's prima facie case to negate the possibility of such a withdrawal. Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove—as a matter of defense—that he effectively withdrew from the conspiracy before the relevant period of limitations began to run.

A withdrawal need not be given only by oral communication, as discussed in *People v. Vargas* (2001) 91 Cal.App.4th 506, 565:

[T]he instruction merely required that there be “an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge.” An “affirmative” act need not be oral.

Withdrawal is not a valid defense to a completed conspiracy, as discussed in *People v. Sconce* (1991) 228 Cal.App.3d 693, 701:

[W]ithdrawal is a complete defense to conspiracy only if accomplished before the commission of an overt act, or, where it is asserted in conjunction with the running of the statute of limitations. . . . [O]nce an overt act has been committed in furtherance of the conspiracy the crime of conspiracy has been completed and no subsequent action by the conspirator can change that. . . . [Such] withdrawal merely precludes liability for subsequent acts committed by the members of the conspiracy.

Withdrawal is not effective when prompted by a fear of detection or arrest, as held in *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003:

[Defendant] claims that he withdrew from any conspiracy by submitting to a search and by his general cooperation with the police when stopped. A defendant's failure to continue previously active participation in a conspiracy is not enough to constitute withdrawal; there must be an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the co-conspirator. . . . A failure to complete a crime

because of threatened arrest or the appearance of the police is not such a free and voluntary act as to constitute an abandonment.